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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

vs.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether issues of contractual application and interpretation which are determinative of the obligation to submit to the grievance procedure should be decided by the court or remitted to the parties' established procedure for resolution where that grievance procedure is broadly defined?

2. Whether a presumption against arbitrability applies to the question of whether parties have agreed to decide what disputes are subject to a contractual grievance procedure when there is contractual language which arguably remits such questions to the parties' grievance procedure rather than the court?

3. Is exhaustion of contractual remedies jurisdictional to any contract claim brought under 29 U.S.C. section 185 so that the issue of jurisdiction may be raised at any time?

4. Whether the implied no-strike obligation of *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 965 (1962), is applicable to a collective bargaining agreement which includes a grievance procedure but specifically prohibits final and binding arbitration?

5. Whether the implied no-strike obligation of *Lucas Flour* extends to a union's dispute over the terms and conditions of a new agreement, which dispute is not subject to a grievance procedure designed to resolve disputes over the interpretation of the agreement?

6. Whether the court could infer a no-strike obligation into a portion of the collective bargaining agreement in

contravention to the parties' settled interpretation of the relevant language where that interpretation is the result of a final and binding decision of a joint labor-management committee?

7. Whether damages may be assessed for stranger picketing where there was no clear and unmistakable waiver of the union's right to engage in picketing outside of its bargaining unit?

LIST OF INTERESTED PARTIES

1. California Trucking Association
2. Associated Freight Lines
3. Consolidated Freightways
4. Pacific Motor Trucking Company
5. Crescent Truck Lines
6. California Motor Transport/California Motor Express
7. Delta Lines, Inc.
8. Haslett Co.
9. Lodi Truck Service
10. East Texas Motor Freight System (successor to Valley Copperstate)
11. System 99
12. T.I.M.E.-DC, Inc.
13. Western Gillette, Inc.
14. Alltrans Express of California, Inc.
15. Transcon Lines
16. Di Salvo Trucking Co.
17. Lee Way Motor Freight, Inc. (successor to Pacific Express Transportation)
18. Morris Draying Company
19. Navajo Freight Lines, Inc.
20. Frank's Trucking
21. Pacific Intermountain Express Company

22. Garrett Freightlines, Inc.
23. Sterling Transit Co., Inc.
24. Yellow Freight System
25. O.N.C. Freight System
26. IML Freight, Inc.
27. Willig Freight Lines
28. Coast Drayage
29. Granny Goose Foods, Inc.
30. Sunshine Biscuit, Inc.
31. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70

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Petitioner,

VS.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brotherhood of Teamsters and Auto Truck Drivers Local 70 respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 679 F.2d 1275 and appears as Appendix A. This opinion affirmed in part, and reversed in part, a judgment of the District Court for the Northern District of California which had entered an opinion, which appears as App. C. The

District Court had previously issued memoranda ruling on some of the issues involved in this Petition which appear as Appendixes D, E, F and G, respectively. They are unofficially reported at 86 LRRM 2683, 88 LRRM 2030, 94 LRRM 2981. The order denying the Petition for Rehearing is Appendix B.

II
JURISDICTION

The opinion of the court was initially filed on October 19, 1981. A timely petition for rehearing was denied on June 3, 1982, with certain modifications of the court's opinion. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III
STATUTORY PROVISIONS

29 U.S.C. section 185 reads in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

IV
STATEMENT OF THE CASE

This matter involves suit brought by a multi-employer bargaining group, as well as two individual snack food houses, seeking damages for two separate strikes occurring

in April and May of 1970. Two separate suits were filed which were eventually consolidated by the district court.[1]

In pretrial orders, the district court dismissed individual defendants, stayed all proceedings with respect to claims occurring on or after May 18, 1970, because the employers had not exhausted the grievance procedure, and denied the same motion with respect to any claims occurring before that date. App. D, E, F and G.

The trial of this matter to the court was held on various days in 1975 and 1976. After post-trial briefs, the district court entered its memorandum opinion holding the Union liable for both strikes and assessing damages in excess of three million dollars. A timely motion for new trial was filed. Although the court denied that motion, the judgment was amended and certain minor damage claims were deleted.

The court of appeals affirmed in large respect the district court's findings, but reversed and remanded with respect to certain damage computations.

As we shall show, fundamental questions concerning collective bargaining agreements are presented by this petition. Before proceeding to the reasons why the petition should be granted, we need to summarize the relevant facts.

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[1]There were related proceedings before the National Labor Relations Board involving allegations that Local 70 violated 29 U.S.C. § 158(b)(1)(B) and § 158(b)(3). See, *Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70*, 194 N.L.R.B. 674, *enf'd* 470 F.2d 509 (9th Cir. 1972) *cert. den.* 414 U.S. 821 (1973); and *Brotherhood of Teamsters, Local 70*, 195 N.L.R.B. 454 (1972). See also *Granny Goose Foods v. Teamsters Local 70*, 415 U.S. 423 (1974).

The employers involved are twenty-seven motor carriers and two snack food manufacturing companies who employ Teamster drivers. The motor carriers were members of a multi-employer bargaining unit known as the California Trucking Association. Through this multi-employer association a national collective bargaining agreement was negotiated known as the National Master Freight Agreement (hereinafter NMFA).[2]

Teamsters Local 70 represents only local pick-up and delivery drivers, and its jurisdiction is limited to Alameda County, California. Each of the employers maintains a terminal or facility in that county, of which only a portion of its employees are represented by Local 70. The remainder of their employees are represented by other unions.

Local 70, as an affiliate of the International Brotherhood of Teamsters, is a party to the NMFA. In addition to the national agreement, there are also local supplemental agreements which cover local geographical areas. This suit is concerned with the Joint Council No. 7 Supplement (JC7 Supp.).

The 1967-1970 NMFA and its supplements were in effect for the period April 1, 1967, to March 31, 1970. Pursuant to Art. 37, Sec. 2, a notice was given in late 1969 that the Union wished to negotiate revisions in the collective bargaining agreement. Negotiations commenced with the employers in Washington and continued throughout the spring of 1970. It is undisputed that there was a failure to agree upon any revisions until April 2, 1970, when a "ten-

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[2]Relevant provisions of the 1967-1970 and 1970-1973 agreements appear at App. I.

tative settlement" was agreed upon. That settlement was eventually ratified and became the 1970-1973 NMFA.

As of midnight, March 31, 1970, there was no agreed-upon collective bargaining agreement, and Local 70 took strike action against some of the carriers involved in this action. That action was eventually extended to other employers on April 3. The initial work stoppage ceased on April 7, and all of Local 70's members returned to work immediately thereafter. The court below found that Local 70 initiated the strike action at a time when no agreement was reached and because Local 70 was dissatisfied with the progress of the negotiations and wished to break away from the multi-union bargaining group.

The May strike action is somewhat different. In Los Angeles, several hundred trucking industry employees had been fired as a result of work stoppages which had occurred in early April and were engaged in wildcat picketing. Early in May, a number of the wildcat strikers from Los Angeles came north and began picketing in Local 70's area. Local 70 adopted the cause of the wildcat strikers and began pressuring the trucking employers to negotiate a separate agreement with the Union. The court below found that Local 70's continued interest in a separate agreement was a cause of the strike. The strike in May lasted until late May or, in some cases, into June.

The district court imposed liability on Local 70 for the five working days of work stoppage in April, as well as the work stoppages in May through May 17. The court stayed all proceedings with respect to damage claims occurring on or after May 18, finding that the 1970-1973 NMFA required the employers to exhaust the contractual grievance procedure. The employers have not pursued those damage claims.

V

WHERE THE PARTIES HAVE AGREED TO A BROAD GRIEVANCE PROCEDURE, UNDER THE PRESUMPTION OF ARBITRABILITY CREATED IN THE STEELWORKERS TRILOGY, ISSUES OF CONTRACTUAL INTERPRETATION WHICH MAY DETERMINE THE ARBITRABILITY OF A DISPUTE SHOULD BE DETERMINED THROUGH THE GRIEVANCE PROCEDURE

When this Court created the presumption of arbitrability in the Steelworkers Trilogy,[3] it was not envisioned that the same principle would apply to employer claims of a union violation of a collective bargaining agreement. Subsequently, this Court recognized that the same doctrine should apply where employers lodged claims that the union had violated the collective bargaining agreement, particularly where an unlawful strike was conducted. *Drake Bakeries, Inc. v. Local 50, Bakery Workers*, 370 U.S. 254 (1962).

Yet in determining what matters are subject to arbitration this Court has stated that the question of arbitrability is one that is reserved to the court, a statement which has led to conflicting results in the federal court system. When declaring that questions of arbitrability are to be decided by the court,[4] this Court has not confronted the problem

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[3] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1968); *United Steelworkers v. Warrior & Emp. Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[4] *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *International Union of Operating Engineers v. Flair Builders, Inc.*, 405 U.S. 487, 491-92 (1972) and *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

that it often requires an interpretation of the agreement itself to determine whether a matter is subject to resolution through the grievance procedure even though the parties have intended to resolve disputes determining arbitrability through their grievance procedure. For example, whether a specific exception to arbitration applies to a particular dispute may require arbitration.[5] Or whether the grievance procedure encompasses employer grievances may also demand the same interpretative procedure.[6]

From these examples it is apparent that the courts have applied contradictory methodology to determining arbitrability: in some cases interpreting the contract themselves or in other cases remanding the question of contract interpretation for the arbitrator to determine the "arbitrability." This case presents an important opportunity to resolve the tension between those methodologies by declaring firmly that where the question of arbitrability is *also* of contractual interpretation that it should be normally

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[5] *Johnston-Tombigbee Furniture Manufacturing Co. v. Local Union No. 2462, Carpenters*, 596 F.2d 126, 128-29 (5th Cir. 1979); *CBS, Inc. v. International Photographers, IATSE*, 603 F.2d 1061 (2nd Cir. 1979); *Wire Service Guild Local 222 v. U.P.I., Inc.*, 623 F.2d 257 (2nd Cir. 1980); *Desert Coca-Cola Bottling Co. v. General Sales Drivers Local 14*, 335 F.2d 198 (9th Cir. 1964); *Carpenters District Council v. Brady Corp.*, 513 F.2d 1 (10th Cir. 1975); *Marble Products Co. v. Local 155, United Stone Workers*, 335 F.2d 468 (5th Cir. 1964); and *contra, Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555 (2d Cir. 1965).

[6] *See I.T.T. World Communications, Inc. v. Communication Workers*, 422 F.2d 77 (2nd Cir. 1970); *International Association of Bridge Etc. v. Superior Court*, 80 Cal.App.3d 346 (1978); *but cf. Friedrich v. Local No. 780*, 515 F.2d 225 (5th Cir. 1975) and *G. T. Schjeldahl Co. v. Local Lodge 1680*, 393 F.2d 502 (1st Cir. 1968).

decided through the arbitration procedure, contrary to the ruling of the court below.[1]

The confusion created in the federal courts by these contradictory approaches is demonstrated in four different ways in this case. In each situation, the court imposed its own interpretation of the agreement in order to determine that the dispute was not subject to the grievance procedure where the parties "[b]y their contract [have] clearly expressed their preference for an arbitral, rather than a judicial interpretation of their obligations under the contract." *Nolde Bros., Inc. v. Bakery and Confectionary Workers*, 430 U.S. 243, 253 (1977).

First, we pointed out that the 1970-1973 NMFA explicitly provided for the resolution of damage claims through the grievance procedure. The court, in part, accepted that argument and stayed proceedings with respect to any damage claims occurring on or after May 18. App. D and E The court however utilizing parole evidence ruled that any claims arising before that date were not subject to the grievance procedure, notwithstanding explicit language of the 1967-1970 NMFA which provided in Art. 37, Sec. 3 that "Revisions agreed upon or ordered shall be effective as of April 1, 1970 . . ." Although we agree that there is conflicting evidence regarding the complete retroactivity of the new agreement, the controversy invokes the problem of interpretation of the agreement as well as the intent of the bargaining parties. As we note in the margin,

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[1] We are not dealing with a situation where the court is called upon to determine the existence of the contract, or the existence of an arbitration provision, something fully reserved to the court. Moreover, the grievance procedure is broad enough to encompass the disputes mentioned before.

the courts of appeals have taken contradictory positions as to whether arbitrability questions arising out of the termination and/or retroactivity of an agreement is to be decided by the court or the parties through their grievance procedure.[8] The court adopted the proposition that although the question of retroactivity was one involving the interpretation of the agreement it was to be accomplished by the court since it ultimately determined the issue of arbitrability. App. A, note 5, and E, p 3-4. Contrariwise, the district court held that the Union could have "submit[ted] to the grievance procedure the question[] whether or not the contracts had expired." App. C p. 34. There is no resolution of this inconsistency.

Second, we contended that the employers' damage claims were factual disputes which did not involve an interpretation of the master agreement and, therefore, had to be submitted to the local grievance procedures contained within the supplemental agreement. App. C p. 16-19. We did so because the JC 7 Supp. grievance procedure was far broader than that of the NMFA procedure and applied to "any grievance or controversy affecting the mutual relations of the Employer and the Union . . ." as well as avoiding the implication of Art. 8(d) discussed, *infra* p. 12. Whether the dispute was "factual" or "interpretative" re-

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[8]See *Local Union No. 4 v. Radio 1380, Inc.*, 469 F.2d 610, 614 (8th Cir. 1972); *Rochdale Village, Inc. v. Public Service Employees Union Local No. 80*, 605 F.2d 1290, 1296 (2d Cir. 1979); *Chattanooga Mailers v. Chattanooga News-Free Press*, 524 F.2d 1305, 1315 (6th Cir. 1975); but *cf. International Union, United Automobile Workers v. I.T.T.*, 508 F.2d 1309 (8th Cir. 1975) and *Kaufman & Broad v. International Brotherhood of Firemen*, 607 F.2d 1104, 1108-112 (5th Cir. 1979).

quiring processing of the dispute at different levels of the grievance procedure, is certainly one of procedure even though ultimately determining the arbitrability of the dispute.[9]

Third, we pointed out that even if the parties had agreed in Art. 8(d) to permit direct legal action where the "strike" was in violation of the agreement we co..tended that "In any event, work stoppages. sick-outs and picketing were not strikes and, therefore, any claims for damage resulting from such actions also had to be submitted to the grievance procedures." App. A, Note 8. The district court sweepingly rejected this claim by finding that the word strike was synonymous with those terms. Surely this was an intrusion into the interpretation of the agreement.[10] *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products*

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[9]Although the courts have recognized that procedural questions arising out of the processing of a grievance are to be decided by the arbitrator, *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Marshall Hale Memorial Hospital v. Hospital & Institutional Workers Union, Local 250*, 647 F.2d 38 (9th Cir. 1981), the courts have sometimes taken upon themselevs to determine the question of arbitrability which arises out of conflicting grievance procedures. See *United Association Local No. 725 v. Honeywell, Inc.*, 607 F.2d 659 (5th Cir. 1979) and *Local 675, U.A. v. Honeywell, Inc.*, 652 F.2d 1301 (9th Cir. 1981). But cf. *Kentucky-West Virginia Gas Co. v. O.C.A.W. Local No. 3-510*, 549 F.2d 407 (6th Cir. 1977) (clause conflicting with arbitration clause subject to resolution through grievance procedure). See also *Francesco's B, Inc. v. Hotel and Restaurant Employees Local 28*, 659 F.2d 1383, 1388 (9th Cir. 1981) (proper for court to let arbitrator determine arbitrability).

[10]Nor have the courts always been consistent as to the meaning of the word strike or other forms of work interruption. See *Jessop Steel Co. v. United Steel Workers*, 428 F. Supp. 172 (W.D. Pa. 1977) and *12th & L. Ltd. v. Local 99-99A I.U.O.E.*, 398 F. Supp. 1174, 1177 (D.D.C. 1975).

Union, 345 F2d 757 (9th Cir. 1965).[11] Had the district court found that any part of the activity of Local 70 was not a "strike" subject to Article 8(d), then it would have stayed the proceedings arising out of those activities.

Fourth, we argued that there were two provisions in the NMFA mandating that the National Grievance Committee would decide the arbitrability of any grievance: Art. 8(g) and 8(f), App. I. The court rejected the argument on the theory that the question of arbitrability may only be decided by the grievance committee if the contract makes it "explicitly" clear that the parties have so agreed. App. A, Note 5. Although arguably these provisions included the arbitrability question, the court reasoned that a reversal of the normal presumption in favor of arbitrability is warranted where Local 70 asserted that those questions should be resolved in the grievance procedure. It is not hard to locate the source of confusion as to the appropriate standard to be applied. In *dicta*, this Court suggested that it requires a "clear demonstration" of an intent by contracting parties to permit the question of arbitrability to be decided by the arbitrator. *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, at n.7. Yet, since then the courts have recognized that the parties may agree to remand questions of arbitrability to their grievance procedure without applying that burden.[12] The standard adopted by the court

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[11]See cases cited at footnote 5, *supra*.

[12]See *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 1366, 1370 (9th Cir. 1979); *Teamsters Local Unions v. Braswell Motor Freight Lines, Inc.*, 392 F.2d 1, 6, n.6, *modified*, 395 F.2d 655 (9th Cir. 1968); but *cf. Metal Product Workers Union 1645 v. Torrington Company*, 358 F.2d 103, 105 (2d Cir. 1966).

below is an express reversal of the normal burden in which the party resisting arbitration must convince the court that "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute." *Id.* at 582-83.

Each of the issues was raised in the district court and then to the court of appeals. In each case, the courts interpreted the contract and rejected petitioner's requests that the matter be treated through the parties' grievance procedure.

As we have shown above, the Steelworkers Trilogy and subsequent cases have left unresolved the question of whether a court, or the arbitrator, should determine the arbitrability of a grievance where that question is decidedly one of interpretation of the provision in the labor agreement. It is time that that issue be resolved consistent with the presumption of arbitrability so as to require such questions to be normally decided by the arbitrator and not the court.

VI

IF EXHAUSTION OF CONTRACTUAL REMEDIES IS JURISDICTIONAL TO A CLAIM ALLEGING A VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT, THEN THE UNION'S ARGUMENT REGARDING THE INTERPRETATION OF ARTICLE 8(d) COULD BE RAISED ON APPEAL

We made one argument that the court below rejected because of Local 70's litigation posture. After determining that the 1967-70 NMFA governed during the period up to May 17, 1970, it read one sentence in Art. 8(d) to permit employer damage claims to proceed: "Nothing herein

shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." The Ninth Circuit agreed with our contention that normally the interpretation of that sentence is one in which the usual "presumption of arbitrability would require the district court to defer to the arbitrator for an interpretation of the words 'strike' and 'in violation of this Agreement'." App. A note 10.

The court rejected our argument because Local 70 had alleged "that it was not bound by the 1967-1970 collective bargaining agreement" (App. A p. 28) and, therefore, "repudiated" its obligations before the court. The court was dead wrong. The Union's position was that, although bound by *that* agreement through March 31, 1970, the Union was not bound by the new agreement effective thereafter. That was what the strike was all about, as well as the collateral litigation before the NLRB.[13] The district court was never confused in this regard. App. C pp. 28-29. Nor did the district court think the Union had waited too long to raise this defense: "[The court] does note that the delay in this case is not likely to disrupt the proceedings to the degree that would, in the court's opinion, justify denial of arbitration on that ground alone." App. D p. 33. Nor was the trial judge unaware of Local 70's position that the meaning of Article 8(d) was reserved for the Grievance Committee for he stated, seemingly exasperated with our repetitive motions:

> "On January 25, 1974, it held that arbitration was not required by the 1967-70 Master Agreement because Article 8(d) of that Agreement specifically permitted suits where strikes were involved. On March 22, 1974,

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[13]See n.1, *supra*.

> the court refused to certify this issue for immediate appeal under 28 U.S.C. section 1292(b) . . . Defendant now seeks essentially to reverse that ruling, relying on the presumption of arbitrability and claiming that damage claims arguably not within the exception to that grievance exhaustion requirement contained in Article 8(d) and that the question of *whether they are within that exception should be arbitrated.*" App. G pp. 1-3 (Emphasis supplied).

Assuming even some merit to the court of appeals' view of the record, would Local 70 have been able to raise the issue at any time in light of the settled doctrine that any jurisdictional issue may be raised at any time during the litigation, either by a party, or by the court. *King Bridge Co. v. Otoe County*, 120 U.S. 225 (1897)? In *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and *Andrews v. Louisville & Nashville RR*, 406 U.S. 320 (1972), this Court has made it clear that an individual worker must exhaust the contractual remedy, otherwise dismissal is mandated. Similarly, where a union fails to exhaust a contractual grievance procedure, a court lacks jurisdiction. *California State Council v. Associated General Contractors*, 648 F.2d 527, 539 (9th Cir. 1980) *cert. granted on other issues*, ... U.S. ..... (1981). On the other hand, with respect to employers' claims against unions, confusion governs in the courts as to the proper disposition.[14]

If our theory is correct that the exhaustion of contractual remedies by any party to a collective bargaining agree-

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[14]Compare *Pilot Freight Carriers v. Teamsters*, 659 F.2d 1252, 1259 (4th Cir. 1981) (dismissal of claim), with *Hardline Electric v. I.B.E.W.*, 1547, 690 F.2d 620, 627 (1982) (remanding "for stay or dismissal") and *Drake Bakeries v. Bakery Workers*, *supra* (stay).

ment is jurisdictional to a claim in the district court on the same theory, then there is no difference when the issue is raised. This Court is compelled to resolve the question of whether exhaustion of contractual remedies by an employer is jurisdictional or not, so as to require employer grievances to be treated identically with union grievances.

VII

WHERE THERE IS NO PROVISION FOR FINAL AND BINDING ARBITRATION, THERE IS NO IMPLIED NO-STRIKE OBLIGATION

In *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 965 (1962), this court held that where a collective bargaining agreement provides for final and binding arbitration, any grievance encompassed by that arbitration clause may not be the subject of strike action.

The grievance procedures contained in the NMFA and the JC 7 Supp. specifically prohibit arbitration of any dispute, for the grievance procedure is composed of a series of multi-level joint committees composed equally of employer and union representatives. There is no necessary finality to any grievance processed through that procedure. This is a grievance procedure for resolution of disputes as distinguished from arbitration because of its lack of finality. *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421, 429 (1967) and *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6th Cir. 1954).[15]

When this Court enunciated the *Lucas Flour* doctrine it did not determine that the existence of a grievance pro-

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[15] In another context, the lack of finality is a decisive factor. *Associated General Contractors of Illinois v. Teamsters*, 486 F.2d 972 (7th Cir. 1973).

cedure absent such finality invoked the same implied no-strike obligation. Indeed, this Court subsequently recognized that that issue has been left open. See *Chauffers, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines*, 370 U.S. 711 (1962). The court below avoided this precise question by generalizing that any grievance procedure is "arbitration" without reaching the question of whether a necessary part of arbitration is finality.[15] App. A. p. 36-38.

We submit that this is an appropriate case in which to resolve that important issue because of the large number of collective bargaining agreements which preclude binding arbitration and rely on the joint committee system.

VIII

WHERE A UNION STRIKES OVER THE TERMS AND CONDITIONS OF EMPLOYMENT, DOES AN IMPLIED NO-STRIKE OBLIGATION EXIST WHERE THE MATTER IS NOT RESOLVABLE THROUGH THE GRIEVANCE PROCEDURE

As we have noted above, there is a substantial question as to whether the *Lucas Flour* doctrine is applicable because the contract lacks a provision for "final and binding arbitration". 369 U.S. at 106. As we shall show in this portion of our petition, the second prong of the *Lucas Flour* doctrine is lacking: whether the strike was undertaken over an issue which "it has been agreed will be covered by compulsory terminal arbitration." *Id* at 106.

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[15] If a joint committee does not deadlock and issues a majority decision, that decision has one attribute of "arbitration": finality and enforceability. *General Drivers v. Riss and Co.*, 372 U.S. 517 (1963).

The court below recognized that the cause of the strike was local 70's dissatisfaction with the course of bargaining and resulted in local 70's efforts to break away from the multi-employer bargaining group.

This Court cautioned in *Lucas Flour* that the doctrine does not "suggest [that] a no-strike agreement is to be implied beyond the area which it has been agreed will be covered by exclusive compulsory terminal arbitration." *Id.* See also *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397 (1976).

It takes no extensive discussion to demonstrate that a union's efforts to force an employer to agree to different terms and conditions of employment is decidedly not a grievable matter but one which may be resolved only through negotiations. *West Texas Utilities Co., Inc. v. N.L.R.B.*, 206 F.2d 442, 446 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 855 (1953).[17] The court read far more into the grievance procedure than is proper when it stated "It is doubtful that under the language of the agreements there was any room for stoppage in the absence of prior arbitration." App. A. p. 36. We believe that the implications of the court's holding are preposterous. Nothing would suggest that the Union *could* grieve its claim for higher wages and different benefits. Moreover, it clashes with the doctrine that "[w]here there has been no express waiver of the right to strike, a waiver of the right . . . is not to be inferred." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957).

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[17]This precise distinction exists under the Railway Labor Act, 45 U.S.C. § 15 *et seq.* See *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 722-23 (1945) and *Railway Employees v. Florida East Coast R. Co.*, 384 U.S. 238-40 (1961).

In light of the doctrine that courts are not to regulate the permissible free play of economic force, it was improper to imply a no-strike obligation beyond those disputes which *are* resolvable through a grievance procedure. This is a compelling opportunity to clarify the *Lucas Flour* doctrine.[18]

IX

THE COURT COULD NOT IGNORE THE INTERPRETATION OF A CONTRACT SETTLED THROUGH A FINAL DECISION OF THE NATIONAL GRIEVANCE COMMITTEE

The first two days of the strike in April were conducted before the national bargaining committees settled on a new agreement. In order to find any no-strike pledge, the court read Art. 37, sec. 3, to infer a no-strike obligation until *impasse* in negotiations occurs. The provision states "The respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon." Since the bargaining continued on those two days without impasse, the court held that no strike could be conducted.

We contended that the phrase had the contrary meaning. Strike or lockout was permitted *until* a new agreement was reached. The court's equating "failure to agree" with "im-

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[18]The ruling of the Ninth Circuit is in conflict with four other courts: *Emery Air Freight Corp. v. Local Union* 295, 449 F.2d 586, 591 (2d Cir. 1971), *cert denied*, 405 U.S. 1066 (1972); *Automobile Transport, Inc. v. Ferdnance*, 420 F.Supp. 75, 77 (E.D. Mich. 1976); *Coordinating Committee v. United Steelworkers*, 436 F.Supp. 208, 215 (W.D. Pa 1977); and *Best Cranes, Inc. v. Local 139 I.U.O.E.*, 93 LRRM 2994 (E.D. Wisc. 1976). See also *Iodice v. Calabrese*, 512 F.2d 383, 389 (2d Cir. 1975).

passe" violated three settled principles: (1) It implied a no-strike pledge where none existed; (2) It interfered with the parties' ability to resolve bargaining position through forces of economic contention; and (3) misread the meaning of "impasse", which is decidedly different from a failure to agree.

More compelling is that the parties have in a National Grievance Committee decision construed precisely this provision to permit economic action without impasse. See App. H. Although we think the clearly erroneous analysis of the phrase is so detrimental to settled principles of labor law that a hearing should be granted on that ground alone, another important point needs clarification. It is a point that is involved in a case presently pending before this court: *W. R. Grace and Co. v. Rubber Workers*, No. 81-1314 (*cert granted* June 28, 1982).[19] The question is whether a court may totally disregard the parties' definitive understanding of a contract as expressed in a joint grievance committee decision.[20]

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[19]See also *OCAW, Local 4-16000 v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981).

[20]That award was enforced by the United States District Court for the Northern District of California in an unpublished decision in case Nos. C-76-661 and C-77-2626-RHS. See also *Western Conference of Teamsters v. Ringsby Truck Lines*, 676 F.2d 383 (9th Cir. 1982).

X

THE UNION'S NO-STRIKE PLEDGE RUNS ONLY TO ITS MEMBERS IN UNITS COVERED BY ITS COLLECTIVE BARGAINING AGREEMENT

A significant portion of the damages in this case were assessed because of picketing by Local 70 outside of its contractual jurisdiction (primarily in San Francisco) and at manufacturing facilities where employees outside of Local 70's bargaining unit respected the picket lines. As to those employees, the picketing was clearly sympathy or stranger picketing, *Buffalo Forge Co. v. United Steelworkers, supra;* since there was no contractual obligation on the part of Local 70 not to cause work stoppages.

Since *Buffalo Forge,* the courts have inconsistently treated sympathy strikes once damage issues arise. "Damage Remedies for Sympathy Strikes After *Buffalo Forge,*" 78 Colum.L.R. 1664 (1978). Here the issue is squarely posed.[21] Absent a "clear and unmistakable" contractual waiver of a union's right to cause work stoppages outside of its jurisdiction, the Union's actions in picketing other facilities cannot cause liability under section 185. *NLRB v. Southern California Edison,* 646 F.2d 1352, 1365-66 (9th Cir. 1981); *Delaware Coca-Cola Bottling Co. v. General Teamster Local 326,* 624 F.2d 1182, 1184 (3d Cir. 1980). In *Eazor Express, Inc. v. I.B.T.,* 520 F.2d 951, 956 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976), the court recognized exactly this proposition where the union's underlying strike was unlawful.

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[21]"The Union does not challenge that it was responsible for the May strike notwithstanding the involvement of the Los Angeles wildcat strikers. We are, therefore, not raising the issue of whether the Union could be properly held liable for those strikes as "sympathy strikes."

This Court is left with a precise legal issue: Absent a "clear and unmistakable waiver" of a union's right to picket outside of its collective bargaining unit by engaging in stranger picketing, can contractual damages be assessed?

CONCLUSION

This case presents a myriad of important labor law issues. Had the district court followed the Union's repeated requests that this matter be stayed or dismissed while the employers' claims proceeded through the grievance procedure, neither the district court nor the court of appeals would have become entangeled in interpreting these complicated collective bargaining agreements.

For the reasons suggested above, this Court should grant this petition and set this case for oral argument.

Dated: August 30, 1982

Respectfully submitted,

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